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UNILATERAL CHANGES BY MANAGEMENT AS A VIOLATION OF THE DUTY TO BARGAIN COLLECTIVELY

*Samuel Lang**

INTRODUCTION

THIS subject requires consideration first of the subsidiary question, "Management's Obligation to Bargain, When does it Begin?" For, obviously, until that basic duty arises, unilateral action creates no problem at all insofar as this subject is concerned.

It is certain that management need not deal with a union until negotiations toward a labor contract have been requested.¹ But from that point forward unilateral action—by which we mean changing wages, hours or working conditions without consulting the bargaining agent—is risky. Ordinarily, when recognition is not voluntary, an election is held to determine the right of the union to represent the employees; but employers are not entitled to have the question of representation resolved in this way as a matter of absolute right, for if they refuse to recognize merely in order to gain time in which to destroy, by illegal means, the union's majority, there may follow an order to bargain even though no election is held and no offer is or has been made to prove majority representation, assuming that, in fact, the union did represent a majority at the time of its demand for recognition.² The NLRB has recently, however, in *Aiello Dairy Farms*,³ held that, having had knowledge of the company's misconduct yet proceeding to a representation election, which it lost, a union may not subsequently urge facts which took place before the election as grounds for finding an unlawful refusal to bargain. Such knowledge by the union may be inferred from the conduct of employees

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¹ NLRB v. Stewart, 207 F. 2d 8 (5th Cir. 1953).

² Smith Transfer v. NLRB, 204 F. 2d 738 (5th Cir. 1953).

³ 110 N.L.R.B. No. 205 (1954).

acting on behalf of the union.⁴ But in such cases where an order to bargain may issue without an election, general interference, coercion or discrimination respecting union activity, while putting off recognition to which the union was entitled, is the basis. In this paper our concern is to see what unilateral action might provoke such an order because it is in the field of bargaining. In brief, considering the collective bargaining requirements of the National Labor Relations Act, as amended, what changes affecting employees does management have the *exclusive* right to make, that is, without giving the union an opportunity to discuss them?

THE STATUTORY PROVISIONS

Section 8 (a) (5) of the Act⁵ makes it unlawful to refuse to bargain, subject to the provisions of Section 9 (a), wherein it is provided that the union selected for such bargaining is the exclusive representative of all employees for dealing on "rates of pay, wages, hours of employment, or other conditions of employment." It is noted in passing that the definition of "labor organization" is defined in Section 2 (5) of the Act as any organization whose purpose is to deal with employers concerning "grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work." Section 9 (a) makes it clear, at the same time, that employees may adjust their *individual* grievances directly with management, so, while unions may represent employees in the handling of grievances, and management, in such cases, must deal with them thereon, an employer need not discuss with the union individual grievances presented by employees who do not want the intervention of the bargaining representative. Nonetheless, whether or not it is desired by the employer or the grieving employee, Section 9 (a) requires that the bargaining agent be given an opportunity to be present when these grievances are adjusted, and it further provides that such adjustments may not be inconsistent with any bargaining contract then in effect.⁶

Further advertng to the statutory provisions, we find in Sec-

⁴ Armstrong Tire & Rubber Co., 111 N.L.R.B. No. 116 (1955).

⁵ All references herein to the act are understood to mean the Labor Management Relations Act, 61 STAT. 136 (1947), 29 U.S.C. § 141 (1952).

⁶ Bethlehem Steel Co., 89 N.L.R.B. 341 (1950).

tion 8 (d) that the requirement to bargain means "in good faith," but that this does not compel either party to agree to a proposal or make concessions. It also provides that there must be notice of sixty days prior to modification or termination of a contract, "and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract." Although the latter provision may at first glance seem to indicate otherwise, the duty to bargain nonetheless exists throughout the contract subject to certain exceptions, as will be seen in the discussion, *infra*, under the topic "During the Bargaining Process".

SOME PRELIMINARY ITEMS

We do not undertake here to show the various basic defenses to a charge of refusal to bargain. These may include the following: (1) The unit is not appropriate; (2) the union has not been freely chosen by the majority of the employees in the unit; (3) an unequivocal demand for bargaining in an appropriate unit has not been made to the proper party; (4) non-compliance of the union with the provisions of Section 9 (f), (g) or (h) of the Act.

Nor do we concern ourselves with unilateral action by management respecting wages, hours and working conditions in cases lying outside the Act's coverage or asserted jurisdiction in regard to supervisors or agricultural employees, and employers placed by the Board outside its sphere of operations. We will but make note of the question of when bargaining rights terminate; but it is appropriate to cite those instances in which by jurisprudence and the law we have been told that employee or union conduct forfeits the right to make management bargain, for in these cases the path is laid open for broad unilateral action.

Where a strike is called in violation of a no-strike contract clause, the employer is free *during the strike* to act unilaterally as in *United Elastic Corporation*,⁷ where a wage increase was

⁷ 84 N.L.R.B. 768 (1949).

granted without consulting the union; and *Elk Lumber Company*,⁸ wherein the employer was excused from the duty to bargain during a slow-down. But after the illegal strike or slow-down or other illegal conduct is over, so long as the union continues to represent the majority of the employees, the duty to bargain is reinstated.⁹ Moreover, the illegal conduct of the union or employees may be offset by provocative unfair labor practices of the employer as in *NLRB v. Mastro Plastics Corp.*,¹⁰ the otherwise illegal conduct of the employees and union being thereby excused.

Generally, an impasse does not relieve the employer of the obligation to bargain; it merely offers a "cooling off period" at the end of which, at the demand of either party, collective bargaining is resumed.¹¹ Nor does the intervention of a strike authorize the employer to ignore the bargaining agent,¹² though, of course, where the union loses its majority while engaging in illegal conduct¹³ or by replacement of economic strikers¹⁴ it may no longer have the right to bargain. However, where the union continues to represent the majority of the employees after the illegal conduct ends, the obligation to bargain continues.¹⁵ The rule of excuse during illegal conduct has been extended to provide that a mere threat to engage in an illegal or unprotected strike or slowdown during negotiations constitutes grounds for the employer's refusal to bargain (and may permit him to act unilaterally) until the threat is disavowed.¹⁶ A contract violation by a union, aside from strikes, may also relieve an employer from the duty to bargain, as, for example, a union's refusal to abide by the contract's seniority provisions.¹⁷ Also, violation of the sixty-day cooling off provision in Section 8 (d), may free the employer to act as he will,¹⁸ as may also occur when unions engage in business in com-

⁸ 91 N.L.R.B. 333 (1950).

⁹ *Higgins, Inc.*, 90 N.L.R.B. 184 (1950).

¹⁰ 251 F. 2d 462 (1954).

¹¹ *Jeffery-DeWitt Insulator Co. v. NLRB*, 91 F. 2d 134 (4th Cir. 1937).

¹² *National Gas Co.*, 99 N.L.R.B. 273 (1952); *U. S. Cold Storage Corp.* 96 NLRB 1108 (1951).

¹³ *NLRB v. Fansteel*, 306 U. S. 240 (1939).

¹⁴ *Celanese Corp. of America*, 95 N.L.R.B. 664 (1951).

¹⁵ *United Elastic Corp.*, 84 N.L.R.B. 768 (1949).

¹⁶ *Valley City Furniture Co.*, 110 N.L.R.B. 216 (1954).

¹⁷ *NLRB v. Sands Mfg. Co.*, 306 U. S. 332 (1939).

¹⁸ *Boeing Airplane Co. v. NLRB*, 174 F. 2d 988 (1949).

petition with employer,¹⁹ or other disqualifying conduct. In *American Laundry Machinery Company*,²⁰ it was held that the employer's unilateral grant of wage increases and benefits were not evidences of bad faith where there was reasonable doubt of the union's continued majority status after the expiration of the certification year and the filing of a decertification petition, and the absence of any prior employer unfair labor practices. But in *NLRB v. International Furniture Company*²¹ it was held that a unilateral grant of paid holidays after the end of the certification year was unlawful where the benefits were retroactive into the certification year and there was no evidence that the union abandoned its claims to represent the employees or lost its majority status. And it has now been set at rest that within the certification year the duty to bargain continues in the absence of unusual circumstances. Such unusual circumstances do *not* include loss of the union's majority without fault of the employer.²² The Board has thus far recognized only the following as "unusual circumstances" sufficient to overcome the presumption of continuing majority during the certification year: (1) The union's dissolution,²³ (2) transfer of affiliation to another union;²⁴ and (3) a material change in the bargaining unit.²⁵

DURING THE BARGAINING PROCESS

Whenever the obligation to bargain exists, the critical language of the Act is that which broadly advises that collective bargaining embraces "rates of pay, wages, hours of employment, or other conditions of employment."²⁶ But before we turn to an examination of what particular conduct the Act puts inside this broad language, we must make certain additional comments necessary to an understanding thereof.

The theory, of course, is that unilateral employer conduct respecting rates of pay, wages, hours, and employment conditions

¹⁹ *Bausch & Lomb Optical Co.*, 108 N.L.R.B. No. 213 (1954).

²⁰ 107 N.L.R.B. No. 316 (1954).

²¹ 212 F. 2d 431 (5th Cir. 1954).

²² *Brooks v. NLRB*, 348 U. S. 96 (1954).

²³ *Public Service Electric & Gas Co.*, 59 N.L.R.B. 325 (1944).

²⁴ *Carson, Pirie, Scott & Co.*, 69 N.L.R.B. 935 (1946).

²⁵ *Celanese Corp. of America*, 73 N.L.R.B. 864 (1947).

²⁶ Section 9 (a).

undermines the bargaining agent's prestige,²⁷ but the essential question of whether unilateral changes violate the obligation to bargain depends on the finding of fact that the employer did or did not show good faith in the totality of his dealings with the union. All of the decisions reflect this. For example, in *Libby, McNeill & Libby*,²⁸ the unilateral inauguration of an incentive plan was considered not per se an unfair labor practice without proof that the increases were a part of a scheme to undermine the union.

There have been isolated cases, too, where unilateral action otherwise violative of the duty to bargain has been condoned because of special circumstances, as in Administrative Decision of NLRB General Counsel, Case No. 237, February 1, 1952, where the employer acted on a reasonable interpretation of a state law regarding contributions to an employees' welfare fund.

Of course, it is well settled that once a proposal has been made in the course of good faith bargaining, accompanied by a reasonable attempt to negotiate thereon, the employer is free (normally, during an impasse) to put it into effect under circumstances that do not or are not calculated to undermine the prestige of the bargaining representative. In *NLRB v. Bradley Washfountain Company*²⁹ these factors were pointed out in the dismissal of the refusal-to-bargain charge based on the granting of benefits during bargaining without agreement of the union even though an impasse had not occurred: (1) The representative was notified in advance, (2) the employees were informed that the representative was *not* satisfied with the benefits granted, (3) the grant of benefits was without prejudice to further negotiations, and (4) there had been a history of amicable bargaining.

And, again, without an impasse, a unilateral wage increase (or other change) may under some circumstances be put into effect where the union is notified in advance and demonstrates its unwillingness to agree to anything less than its full demands, where the employees were advised that the matter had been discussed with the union and care was exerted not to leave the impression

²⁷ *Riverside Mfg. Co.*, 20 N.L.R.B. 394 (1940).

²⁸ 65 N.L.R.B. 873 (1946).

²⁹ 192 F. 2d 144 (7th Cir. 1951).

that the employer was withdrawing from negotiations.³⁰ But, of course, the unilateral grant of a wage increase, after the proposal thereof has been left unaccepted, does not authorize, before or after a bargaining impasse, a greater increase than that offered the union.³¹ And, when putting into effect a unilateral wage increase previously offered the union, even after an impasse, it must not be done in such a way as to disparage the bargaining agent or undermine its prestige.³²

Where the employer puts into effect previously offered increases to try to ward off a strike,³³ or where previously offered higher rates are made effective for or offered to economic strike replacements once a strike begins,³⁴ no refusal will be found. But a wage increase not previously offered the union may not be given to employees remaining at work in a struck plant, despite the consideration of their exposure to danger, because this tends to discourage the strike.³⁵ In general, however, it may be said that an employer may put into effect, unilaterally, changes proposed but rejected by the union after a reasonable attempt to bargain thereon.

When we talk about various unilateral acts being violations of the obligation to bargain, we should constantly bear in mind that we are always talking about conduct engaged in without discussion with the bargaining agent.

With these preliminaries before us we now examine the unilateral acts and conduct of management which have been held to violate the obligation to bargain, remembering that "rates of pay, wages, hours of employment, or other conditions of employment" is the framework of the field which we are entering.

As one might expect from the broad purposes of the statute to promote collective bargaining between employers and unions, the area and subject matter of bargaining have been continually widened to include almost everything that may affect, directly or

³⁰ *W. W. Cross & Co.*, 77 N.L.R.B. 1162 (1948). See also *Majure Transport Co.*, 95 N.L.R.B. 311 (1951), where the union was notified that the company intended to make some unilateral wage increases but ignored the notification and did not request discussion.

³¹ *NLRB v. Crompton-Highland Mills, Inc.*, 337 U. S. 217 (1949).

³² *Reed & Prince Mfg. Co.*, 96 N.L.R.B. 850 (1951).

³³ *Montgomery Ward & Co.*, 90 N.L.R.B. 1244 (1950).

³⁴ *Pacific Gamble Robinson v. NLRB*, 186 F. 2d 106 (6th Cir. 1950).

³⁵ *James Thompson & Co.*, 100 N.L.R.B. 456 (1952).

indirectly, the income, future, health or convenience of employees. As will be seen, when there is an established bargaining agent, it may not be by-passed in any material aspect of the field covered. Illustrative of the extension of the limits of bargaining are the decisions prohibiting unilateral action with respect to group health, accident and life insurance programs,³⁶ and pensions and retirement plans.³⁷ These sanctions apply even to the voluntary inauguration of such benefits.³⁸ An example of the severity of the rule of prohibition is *Montgomery Ward & Company*,³⁹ where an unfair labor practice was found in the mere substitution of one insurance agency for another for the handling of a welfare plan, though there the substitution imposed an additional cost on the employees affected. Such welfare benefits are "wages," the courts have said, and there may be neither increases,⁴⁰ nor may there be decreases in wages⁴¹ by unilateral act.

There are special instances when unilateral action should be and is excused but it was held in *NLRB v. Union Manufacturing Company*⁴² that rate revision to maintain differentials after an increase in the minimum under the Fair Labor Standards Act of 1938 is not one of them. Nor does the fact that an overhauling of the wage structure is necessary merely to conform to "company policy" permit management to do so unilaterally.⁴³ Neither does it matter that a general increase was given simultaneously in the employer's other plants,⁴⁴ or that the increase was urgent to prevent loss of employees to competitors, since it nonetheless weakens the union's position as the bargaining representative.⁴⁵

³⁶ *Cross & Co. v. NLRB*, 174 F. 2d 875 (1st Cir. 1949); *NLRB v. General Motors Corp.*, 179 F. 2d 221 (2d Cir. 1950).

³⁷ *Inland Steel Co. v. NLRB*, 170 F. 2d 247 (7th Cir. 1948), *cert. denied*, 336 U. S. 960 (1949); *Allied Mills*, 82 N.L.R.B. 854 (1949); *Tidewater Associated Oil Co.*, 85 N.L.R.B. 1096 (1949); *The Black-Clawson Company*, 103 N.L.R.B. 928 (1953).

³⁸ *Square D Co.*, 105 N.L.R.B. 253 (1953).

³⁹ 90 N.L.R.B. 1244 (1950).

⁴⁰ *Armstrong & Hand, Inc.*, 104 N.L.R.B. 420 (1953); *Southwestern Wholesale Grocery Co.*, 92 N.L.R.B. 1485 (1951); *Great Southern Trucking Co. v. NLRB*, 127 F. 2d 180 (4th Cir. 1942).

⁴¹ *Franklin Hosiery Mills, Inc.*, 83 N.L.R.B. 276 (1949); *Jordan Bros. Co.*, 107 N.L.R.B. No. 148 (1954).

⁴² 200 F. 2d 656 (5th Cir. 1953).

⁴³ *V-O Milling Co.*, 43 N.L.R.B. 348 (1942).

⁴⁴ *Cookeville Shirt Co.*, 79 N.L.R.B. 667 (1948).

⁴⁵ *NLRB v. Shannon*, 208 F. 2d 545 (9th Cir. 1953); *Sullivan & Sons Mfg. Corp.*, 102 N.L.R.B. 2 (1953).

Indicative of the precautions that must be taken, *Woodruff d/b/a Atlanta Broadcasting Company*⁴⁶ held that the Act was violated when an employer put into effect an increase agreed on but not yet reduced to writing and signed, because thereby the bargaining agent's prestige was undermined by indicating that the employer, rather than the union, was to be thanked for the raise. It is different, though, where the union has had a meeting and approved the increase, even though the contract as a whole is never consummated because of the failure of the parties to agree on other terms.⁴⁷ Also characteristic of the emphasis placed by the Board on overall good faith bargaining is the case where the employer makes the slip of granting the wage increase or other benefit unilaterally during bargaining, then immediately thereafter engages in discussion and considers proposals thereon and demonstrates its sincerity with respect thereto, especially where it may be shown that the unilateral action does not have the effect of and was not intended to discourage union membership or collective bargaining.⁴⁸

Where changes in wages, etc., are made while bargaining negotiations are in prolonged "suspension" due to a deadlock on *unrelated* provisions of the proposed contract, the action has been held not to have been taken to by-pass the bargaining representative, the Board declaring: "... in the circumstances the respondent was under no duty to withhold normal action respecting wages pending consultation with the union. . . ."⁴⁹ Another excuse for unilateral pay changes is found in *E. A. Laboratories, Inc.*,⁵⁰ where rates in excess of those permitted by the Wage Stabilization Act were discontinued.

Sometimes, when the change is not too drastic, the failure of the bargaining agent to protest it saves the employer from a finding of refusal to bargain, as in *Atlanta Journal Company d/b/a Radio Station WSB*,⁵¹ involving the substitutions of a flat pay

⁴⁶ 90 N.L.R.B. 808 (1950).

⁴⁷ Milwaukee Electric Tool Corp., 110 N.L.R.B. No. 167 (1954).

⁴⁸ Western Printing Co., 34 N.L.R.B. 194 (1941).

⁴⁹ Montgomery Ward & Co., 39 N.L.R.B. 229 (1942). See also Westchester Newspapers, Inc., 26 N.L.R.B. 630 (1940).

⁵⁰ 80 N.L.R.B. 625 (1948).

⁵¹ 82 N.L.R.B. 832 (1949).

raise for a bonus system some time after the union had opposed the bonus system.

And bonuses have also come in for their share of attention. Apparently, whether one must bargain on bonuses depends on whether they are truly *gifts*, rather than some form of remuneration, as where length of service, the previous earnings, efficiency, etc., of the employee are considered in determining whether the bonus is given or in arriving at the amount thereof. But where they are given vicariously, irregularly, wholly and solely within the discretion of the employer and not based on any particular standards, they *may* be "gifts" and therefore outside the area of required bargaining.⁵²

It is no violation, of course, to grant a Christmas bonus where it is traditional and as long as the union does not ask to bargain on it or object to it.⁵³ Moreover, an employer will be absolved from blame, if it refuses to bargain on the amount of a bonus to be paid several months away, at Christmas time, when its practice had been to determine just before Christmas how much it felt able to pay at that time, if anything.⁵⁴

Obviously, piece rates, bonus rates, and incentives, generally, must be and they have been considered to be "wages." And this is so whether there is involved the inauguration of such a system,⁵⁵ the continuance thereof,⁵⁶ or reduction therein.⁵⁷ But management does not even have the right to determine unilaterally the production quotas to be attained by the employees before these incentives go into effect.⁵⁸ What about work loads of employees, where no incentives or piece rates are in effect? Is this a management function, if the only point is that the company is not satisfied with the amount of work turned out by the employee? This prob-

⁵² See *NLRB v. Niles-Bement-Pond Co.*, 199 F. 2d 713 (2d Cir. 1952), where the bonus had been given regularly for many years, based on employee earnings, etc.

⁵³ *Texas Foundries, Inc.*, 101 N.L.R.B. 1642 (1952).

⁵⁴ *Tower Hosiery Mills, Inc.*, 81 N.L.R.B. 658 (1949).

⁵⁵ *Mason & Hughes, Inc.*, 86 N.L.R.B. 846 (1949).

⁵⁶ *John W. Bolton & Sons*, 91 N.L.R.B. 989 (1950).

⁵⁷ *Atlantic Metallic Casket Co.*, 91 N.L.R.B. 1225 (1950). See also *Epstein d/b/a Top Mode Mfg. Co.*, 97 N.L.R.B. 1273 (1952).

⁵⁸ *Camp & McInnes*, 100 N.L.R.B. 524 (1952); *I. B. S. Mfg. Co.*, 96 N.L.R.B. 1263 (1951); *rev'd. on other grounds*, *NLRB v. I. B. S. Mfg. Co.*, 210 F. 2d 634 (5th Cir. 1954).

ably would also have to be discussed with the union, if requested.⁵⁹ Certainly, the arbitration cases are many where decisions have been rendered on grievances of employees that they were required to work too hard under management-fixed standards of production, and if a thing may become the subject of a grievance, does it not fall within the field of collective bargaining?

A complaint was issued in *Crown-Zellerbach Corporation*⁶⁰ after the employer installed new equipment and set piece rates thereon unilaterally. The reasons assigned for dismissing the complaint were that the company had a good bargaining history and that it discussed the new piece rates with the union after it protested even though the deed had been done and, as a practical matter, was over with.

Piece rate problems are vexatious for unions and employers alike in the bargaining relationship. It is interesting to note therefore that there apparently is nothing improper in continuing to make changes in piece rates on the basis of time studies where the union is not seeking to bargain on individual rates but, rather, is trying to work out an overall plan for setting them. Nor is it improper for management to insist upon an agreement which would eliminate piece rate grievances during the contract term.

Interesting discussions have surrounded the granting of merit increases, in which the emphasis has been upon whether these are "gifts" to individual employees deserving of special consideration. But in the landmark case of *NLRB v. J. H. Allison & Company*⁶¹ it was held a refusal to bargain to grant merit increases unilaterally, despite advancement of the theory that the individual rather than the whole working force was being treated with, and even though such merit increases had been granted unilaterally without objection over a number of years. The court said:

We think the logical deduction to be drawn from the opinions of the Supreme Court is that . . . the obligation . . . to bargain . . . includes the duty to bargain . . . concerning individual merit wage increases. The labelling of a wage increase as a gratuity does not obviate the fact that a gratuitous increase on the basis of merit does, in actuality,

⁵⁹ *But cf.* NLRB GENERAL COUNSEL ADMINISTRATIVE RULING, Case No. 799 (1953).

⁶⁰ 95 N.L.R.B. 753 (1951).

⁶¹ 165 F. 2d 766 (6th Cir. 1948).

effectuate changes in rates of pay and wages, which are by the Act made the subject of collective bargaining.

The court in the *Allison* case quoted from *May Stores Company v. Labor Board*,⁶² in which it was said:

Such unilateral action minimizes the influence of collective bargaining. It interferes with the right of self-organization by emphasizing to the employees that there is no necessity for a collective bargaining agent.

We, however, anticipate another subdivision of this article to say that unilateral periodic individual merit increases can indeed be given during a contract term where the agreement provides for minimum and maximum wage rates in each job classification as well as an elaborate rating system, the contract ceding by inference or directly that the employer has the right to grant merit increases and there being a history of acquiescence in such unilateral merit increases for a long period of time, despite the union's demand that it be consulted before granting such increases and the refusal thereof.⁶³

Where merit increases follow a policy established before the union began to organize, there is no refusal to bargain; but this would not hold up once the union made a demand for bargaining on such merit pay.⁶⁴ Nor is there a violation, of course, where the union knows about the unilateral grant of merit increases during negotiations and makes no protest.⁶⁵

Among other topics included under the obligation to bargain on "wages" are overtime and stand-by pay,⁶⁶ vacation pay and holiday pay,⁶⁷ the method of computing such pay,⁶⁸ job evaluation,⁶⁹ stock purchase plans in which employees contribute to the plan,⁷⁰ as well as those in which stock is issued without cost to

⁶² 326 U. S. 376 (1945).

⁶³ General Controls Co., 88 N.L.R.B. 1341 (1950).

⁶⁴ Southshore Packing Corp. 73 N.L.R.B. 1116 (1947).

⁶⁵ Frohman Mfg. Co., 107 N.L.R.B. 1308 (1954).

⁶⁶ Southern Pine Electric Cooperative, 104 N.L.R.B. 834 (1953).

⁶⁷ Whitinsville Spinning Ring Co., 97 N.L.R.B. 801 (1951); Wheatland Electric Cooperative, Inc., 102 N.L.R.B. 1119 (1953).

⁶⁸ Phelps Dodge Copper Products Corp., 101 N.L.R.B. 360 (1952).

⁶⁹ Montgomery Ward & Co., 90 N.L.R.B. 1244 (1950); Old Line Life Insurance Co., 96 N.L.R.B. 499 (1951).

⁷⁰ Richfield Oil Corp., 110 N.L.R.B. No. 54 (1954).

employees with a certain length of service,⁷¹ credit unions and savings and loan funds.⁷² There are many other topics, too, like severance pay, the opening or closing of company cafeterias, and selling products of the employer at a discount, which may fall within the broadly-construed meaning of "wages".

It is elementary that a unilateral change in working hours is unlawful.⁷³ But the term "hours of employment" likewise has been given a liberal construction. It applies to the length of the work day,⁷⁴ the length of the work week,⁷⁵ changes in work shifts,⁷⁶ and rest and lunch periods.⁷⁷ It follows, of course, that the term also applies to work schedules,⁷⁸ distribution of overtime, etc.

It is sometimes difficult to determine whether an item about which the union wishes to bargain falls under the specific heading of "wages" or of "hours" or of "other conditions of employment" within the meaning of Section 9 (a). The Board and the courts do not always bother to make the subject in controversy specifically fit under one of these express categories, but simply show that it is a question important to the relationship between employer and employee, or that it logically belongs or customarily has been considered in this field.

In *Weyerhaeuser Timber Company*,⁷⁹ the Board found a refusal to bargain in the unilateral increase of prices of meals at isolated lumber camps. While the employees were not compelled to eat there, said the Board, they had little choice if they were to work at those locations. The Board moreover rejected the argument that "conditions of employment" has no broader meaning than that perhaps spontaneously suggested by the term "working conditions"

⁷¹ United Shoe Machinery Corp., Inc., 96 N.L.R.B. 1309 (1951).

⁷² But see *E-Z Mills, Inc.*, 106 N.L.R.B. 1039 (1953), in which a unilateral withdrawal of employer assistance to a credit union was held not unlawful where the union indicated it did not desire to bargain on the subject. But cf. *De Diego Taxi Cabs, Inc.*, 107 N.L.R.B. 1026 (1954).

⁷³ *Oughton v. NLRB*, 118 F.2d 486 (3rd Cir. 1941); *Tennessee Valley Broadcasting Co.*, 83 N.L.R.B. 895 (1949).

⁷⁴ *Camp & McInnes, Inc.*, 100 N.L.R.B. 524 (1952).

⁷⁵ *Bergen Point Iron Works*, 79 N.L.R.B. 1073 (1948).

⁷⁶ *American National Insurance Co.*, 89 N.L.R.B. 185 (1950).

⁷⁷ *National Grinding Wheel Co.*, 75 N.L.R.B. 905 (1948); *Camp & McInnes, Inc.*, 100 N.L.R.B. 524 (1952).

⁷⁸ *Danker Motor Sales*, 107 N.L.R.B. No. 272 (1954).

⁷⁹ 87 N.L.R.B. 672 (1949).

and that it, therefore, only refers to the physical conditions under which employees are compelled to work rather than to the terms or conditions under which employment status is afforded or withdrawn.

The Board's position in this respect must, however, be viewed today in the light of *NLRB v. Bemis Brothers Bag Company*,⁸⁰ in which the Board was reversed, the Court of Appeals holding that terms and conditions relating to occupancy of company-owned houses are not "wages" or "other conditions of employment" where there is no evidence that the rentals charged are so much less than those charged for comparable housing in the vicinity as to be part of wages and the employees are under no compulsion arising either from express requirement or force of circumstances to live in the company houses. The Court of Appeals for the Fourth Circuit reached a different result in *Lehigh-Portland Cement Company*,⁸¹ where twenty-five per cent of the employees lived in company houses and the rent was below the prevailing rate, so there the Board order was enforced. The company-house cases have included Board orders declaring unilateral eviction of tenants to be unlawful,⁸² and requiring discussion with the union of lease agreements.⁸³

"Conditions of employment" will be found to include just about everything (other than "wages" and "hours of work," heretofore discussed) that is normally found in union contracts, and some things that are not. Is it logical under the foregoing discussion that the practice of an employer in making personal loans to employees, and permitting them to repay in small weekly amounts, might be made the subject of collective bargaining? *It is* a subject the employer must bargain on.⁸⁴ Does an employer have the right to decide, without consulting a union, whether the tools and clothing of employees shall be kept under the company's lock and key without unlimited access thereto by the employees? The Board has held⁸⁵ that it substantially changes and prejudices the "condi-

⁸⁰ 206 F. 2d 33 (5th Cir. 1953).

⁸¹ 205 F. 2d 821 (4th Cir. 1953).

⁸² *West Boylston Mfg. Co. of Alabama*, 87 N.L.R.B. 807 (1949).

⁸³ *Elgin Standard Brick Mfg. Co.*, 90 N.L.R.B. 1467 (1950).

⁸⁴ *But cf. Porto Rico Container Corp.*, 89 N.L.R.B. 1570 (1950).

⁸⁵ *Pacific Power Co.*, 84 N.L.R.B. 280 (1949).

tions of employment" of an employee for the employer to substitute his own lock and key for that of the employee. And so on and on go the decisions; the unilateral change of pay day by the employer may provoke an order to bargain thereon, unless the union knew of the change and did not protest it.⁸⁶ Of course, the hiring and firing of employees is a proper subject for bargaining, as well as for the grievance procedure once a contract is signed. In *Deena Artware, Inc.*,⁸⁷ there was a refusal to bargain on the discharge of union leaders, and in *NLRB v. Acme Air Appliance Company*,⁸⁸ it was pointed out that an employer may not deal directly with strikers for their reinstatement while a union is still their bargaining agent.⁸⁹ It is clear, too, that the union should be advised of and given an opportunity to bargain on the recall of laid off employees,⁹⁰ as well as the impending lay off of employees,⁹¹ even though the lay offs will result from a complete shut down of the business for economic reasons.⁹²

Moreover, a company may not move its plant to another location without giving the union a chance to discuss the removal and obtain the names and location of new owners, if any.⁹³ While there is no obligation to consult with the union before going out of business for non-discriminatory reasons,⁹⁴ the certification of a union and the obligation to bargain continues after a bona fide sale since there is no reason to believe the employees will change their attitude regarding the choice of a representative merely because the identity of their employer has changed.⁹⁵

The Act, as already observed, permits adjustment of grievances with individual employees. The express exception of individual grievances from the compulsory bargaining scheme is significant,

⁸⁶ *But cf.* *Betty Brooks Company*, 99 N.L.R.B. 1237 (1952).

⁸⁷ 86 N.L.R.B. 732 (1949).

⁸⁸ 117 F. 2d 417 (2d Cir. 1941).

⁸⁹ *But cf.* *NLRB v. Sands Manufacturing Co.*, 306 U. S. 332 (1939).

⁹⁰ *West Bolyston Mfg. Co. of Alabama*, 87 N.L.R.B. 808 (1949).

⁹¹ *U. S. Gypsum Co.*, 94 N.L.R.B. 112 (1951).

⁹² *Cf.* *Eva-Ray Dress Mfg. Co.*, 88 N.L.R.B. 361 (1950).

⁹³ *But cf.* *NLRB v. Rome Products Co.*, 77 N.L.R.B. 1217 (1948); *Brown Truck & Trailer Manufacturing Co.*, 106 N.L.R.B. 999 (1953); *California Portland Cement Co.*, 101 N.L.R.B. 1436 (1952).

⁹⁴ *Walter Holm & Co.*, 87 N.L.R.B. 1169 (1949); *E-Z Mills, Inc.*, 106 N.L.R.B. 1039 (1953).

⁹⁵ *NLRB v. Armato*, 199 F. 2d 800 (7th Cir. 1952).

and it offers broad possibilities for unilateral action which may become important where strong minorities exist within contracting unions or where a device is sought to set up a buffer between the employees and outside organizations. In one case there was no bargaining agent and the employer dealt with a committee elected by the employees to represent them in the handling of grievances.⁹⁶ The Court of Appeals, reversing the Board, indicated this to be outside the field exclusively reserved for collective bargaining and, therefore, cleared the employer of a charge of interference with and domination of a labor organization.

In *Globe-Union, Inc.*,⁹⁷ the employer adjusted a rate grievance with an employee without notifying the union, but the employer had frequently done this after posting the proposed rates on the bulletin board. The union was aware of the practice and so it was held that there was no violation. But *Leader News Company*⁹⁸ held that this failure to protest the practice of individual grievance settlements, outside the presence of the union representative, does not free the employer from the obligation to see that the union has an opportunity to have a representative present in the adjustment of individual grievances in the future. Long ago, in *NLRB v. North American Aviation, Inc.*,⁹⁹ there was court approval of unilateral establishment of separate procedure for settlement of grievances presented by employees individually, despite the grievance procedure in the contract, in view of the proviso in Section 9 (a).

Although the Board unquestionably has the power to order management to bargain on subjects covered by contract grievance procedures, and the Act provides that the Board's power in this and other respects "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise,"¹⁰⁰ the Board has laid down the requirement that unions first resort to arbitration under their contracts before pursuing unfair labor practice charges.¹⁰¹ In *Cal-*

⁹⁶ *NLRB v. Associated Machines, Inc.*, 219 F. 2d 433 (6th Cir. 1955).

⁹⁷ 97 N.L.R.B. 1026 (1952).

⁹⁸ 90 N.L.R.B. 119 (1952).

⁹⁹ 136 F. 2d 898 (9th Cir. 1943).

¹⁰⁰ Section 10 (a).

¹⁰¹ *Consolidated Aircraft Corporation*, 47 N.L.R.B. 694 (1943). *But cf.* *NLRB v. Standard Oil Co.*, 196 F. 2d 892 (6th Cir. 1952).

*fornia Portland Cement Company*¹⁰² certain work was removed to another city. The union filed a grievance under the existing contract, but the employer *refused to discuss it* after a charge of refusal to bargain was filed with the Board. In ordering the company to bargain on the question, the Board distinguished this case from those where the union failed to invoke the available contract grievance procedure. In *Bethlehem Steel Company*¹⁰³ the company wanted to let union representatives be present at the adjustment of grievances only if the aggrieved employees so elected. The union would not agree to this, so the company went ahead and adjusted such grievances anyway without the presence of the union representatives. The Board found this is to be a violation of Section 8 (a) (5).

Some interesting questions have arisen, also, in connection with bargaining over working rules, which are a subject of bargaining.¹⁰⁴ In *Tower Hosiery Mills, Inc.*,¹⁰⁵ the Board found a violation in the posting of working rules without consulting the union, even though the rules were technically in existence, where they had not been enforced for several years and had never before been reduced to writing. However, it found no violation where the rules had actually been in effect and enforced for some time but had just never been reduced to writing, and they were now posted without first consulting the union.¹⁰⁶ Nor is there a violation in the unilateral adoption of a rule prohibiting telephone calls during working hours,¹⁰⁷ which follows the principle approved in *Peyton Packing Company*,¹⁰⁸ that "working time is for work" and that the Act does not prevent an employer from making reasonable rules covering the conduct of employees while at work.

Also covered by Board orders to bargain, denying the right of unilateral action therein, are the subjects of employee discipline, the promotion of employees from one rank and file job to an-

¹⁰² 101 N.L.R.B. 1436 (1952).

¹⁰³ 89 N.L.R.B. 341 (1950).

¹⁰⁴ NLRB v. Union Manufacturing Co., 200 F. 2d 656 (5th Cir. 1953).

¹⁰⁵ 81 N.L.R.B. 658 (1949).

¹⁰⁶ Mason & Hughes, 86 N.L.R.B. 848 (1949).

¹⁰⁷ National Grinding Wheel Co., 75 N.L.R.B. 905 (1948).

¹⁰⁸ 49 N.L.R.B. 828 (1943).

other,¹⁰⁹ or their demotion.¹¹⁰ And the unilateral transfer of employees is also a violation of the Act,¹¹¹ as may also be true of the discontinuance of a department.¹¹²

Much thought has been devoted to the right of unions, under the Act, to insist upon bargaining over the subcontracting of work. Unions have been wary of the motives of employers in parcelling out production to other companies, especially where it has directly affected employment of their members, and there are many arbitration cases involving grievances of this nature. Indeed, it would seem that the fate of this question must rest with the arbitrators, unless the right to subcontract is reserved to management in the labor agreement itself. However, in *Timkin Roller Bearing Company*,¹¹³ the company had subcontracted without objection for many years, including a long period of contractual relations with the union. The union then struck, in violation of the no-strike clause of its contract, alleging refusal to bargain on grievances (including subcontracting). It was held that "subcontracting" fell within the broad managerial clause of the contract, even though it did not specifically refer to subcontracts, when considered with the long practice of subcontracting by management without objection by the union. The Board, in *The Hughes Tool Company*,¹¹⁴ where there was involved a management rights clause reserving all previous rights not relinquished in the contract, upheld, citing the *Timken* decision, the unilateral right of the company to subcontract because a prior contract had expressly vested that right in the company. Another decision, *NLRB v. Houston Chronicle Publishing Company*,¹¹⁵ reversing the Board, held that the evidence was insufficient to support the conclusion that the purpose of a change in the newspaper's distribution system from handling directly by employees to handling by independent contractors was to defeat organization of its employees. But we may infer even

¹⁰⁹ *NLRB v. W. T. Grant Co.*, 199 F. 2d 711 (9th Cir. 1951).

¹¹⁰ *Allis-Chalmers Manufacturing Co. v. NLRB*, 161 F. 2d 435 (7th Cir. 1947).

¹¹¹ *The Hughes Tool Co.*, 100 N.L.R.B. 208 (1952).

¹¹² *But cf. National Gas Co.*, 99 N.L.R.B. 273 (1952).

¹¹³ 161 F. 2d 949 (6th Cir. 1947).

¹¹⁴ 100 N.L.R.B. 208 (1952).

¹¹⁵ 211 F. 2d 848 (5th Cir. 1954).

from that decision that once the bargaining relationship is established such subcontracting may well be within the area in which the employer is required to deal.

UNILATERAL FREEDOM BY CONTRACT: THE MANAGEMENT RIGHTS CLAUSE

From all that has been said thus far it would appear that where there are no exceptional circumstances, management may be hopelessly restricted if the unions choose to insist on bargaining on the seemingly numberless subjects that can be raised. But this is not so. In fact, management can retain or regain its freedom to the extent that the use of its superior economic strength is consistent with good faith. This is the net result of the Supreme Court's decision in the celebrated *American National Insurance Company* case.¹¹⁶ Here the company insisted on a management functions clause listing matters such as promotions, discipline and work scheduling as its responsibility alone, and excluding such subjects from arbitration. The Court held this *not* to be a refusal to bargain. This is what needs emphasis: A union may waive its statutory right—to what extent we may not be sure, but it can agree to exclude important wage, hours and employment conditions questions from bargaining for the duration of its contract. This the Board itself recognized a decade ago in *May Department Stores*.¹¹⁷

The duty to bargain is absolute, the Court of Appeals for the Sixth Circuit said in *Timken Roller Bearing Company v. NLRB*,¹¹⁸ but “it may be channeled and directed by contractual agreement.” As far back as *NLRB v. Jones & Laughlin Steel Corp.*,¹¹⁹ under which the validity of the NLRA was sustained, the Supreme Court said that the Act “does not compel agreements between employers and employees.” From that point forward the question of “what is good faith” when the parties have failed to reach an agreement has been litigated in hundreds of cases. But the decisions of the Board time and again made it appear that management had to

¹¹⁶ *NLRB v. American National Ins. Co.*, 343 U. S. 395 (1952).

¹¹⁷ 59 N.L.R.B. 976.

¹¹⁸ 161 F. 2d 949 (6th Cir. 1947).

¹¹⁹ 301 U. S. 1 (1937).

yield to some extent on certain fundamental issues. The courts frequently disagreed, however, declaring that the Board's functions do not include the dictation of terms of the agreement though its responsibility does embrace determination of whether there has been good faith. This, of course, is the law today.

The Supreme Court said in the *American National Insurance* case:

Congress provided expressly that the Board should not pass upon the desirability of the substantive terms of labor agreements. Whether a contract should contain a clause of fixing standards for such matters is an issue for determination across the bargaining table, not by the Board. If the latter approach is agreed upon, the extent of union and management participation in the administration of such matters is itself a condition of employment to be settled by bargaining.

There appears to be no limit on how far an employer may go in insisting, and a union in agreeing, that the employer-employee relationship and the incidents thereto may be left within the exclusive control of management—except this, as is repeatedly emphasized here, that the overall circumstances show good faith. This, of course, requires serious examination of the position taken with respect to each item whose control the employer seeks. One test, certainly, is whether the position assumed on each such detail is supported by logic. It does not have to be persuasive necessarily, but there probably would have to be apparent justification—as there is in the demand in the *American National Insurance* case that promotions, discipline and work schedules be left entirely to management's discretion. But what is good faith in one case may not be so in another, and facts and figures might well have to be presented to support particular views in the bargaining process itself.

It is readily seen from this and from examination of the other extreme that the *American National Insurance* decision does not give the employer absolute control of the bargaining process when the union is not strong enough to stage a successful strike.¹²⁰

That there are elements of the employer-employee relationship

¹²⁰ See *Dixie Corp.*, 105 N.L.R.B. 390 (1953). But cf. *Majure Transport Co. v. NLRB*, 198 F. 2d 735 (5th Cir. 1952); *Brotherhood of Railway Clerks v. Atlantic Coast Line R.R.*, 201 F. 2d 36 (4th Cir. 1953).

which may not be reserved by management nor waived by unions is quickly apparent when it is observed that while the right to solicit members on company property during nonworking hours may be given up, never may a labor organization yield the privilege of employees to continue their union membership.

It is conceivable, however, that a concession large enough in some circumstances, and no concession at all under other conditions, both might justify the insistence of management upon reservation by contract to its sole judgment of nearly every phase of the area *normally* relegated to bargaining.

There can be no assurance, on the other hand, that there is anything in the sphere of management activities, with the few exceptions noted, that is outside the scope of the right of the employees' representative to bargain thereon. Suppose the employees object to working on a certain product because they consider contact with the materials to be injurious to their health? Does the union have the right to say what or how management is to manufacture? By thumbing through almost any volume of the decisions of arbitrators it will be seen readily that employers run afoul of union grievances when they seek to determine the requirements, standards and qualifications necessary to perform jobs; the number, length and scheduling of shifts; all kinds of other operating changes, the choice of personnel, and—as seen throughout this discussion—a myriad of other things which are of obvious importance to good business management.

The answer, then, to the problems of management under the National Labor Relations Act, if there be one, seems to have been found in its relative freedom at the bargaining table—in its right to bargain for sweeping and effective management prerogatives clauses.

Some such clauses list specific matters over which exclusive control is reserved. Others simply contain a general reservation of all rights that “normally reside in management” or that have not been specifically bargained away by express coverage in the contract. The weakness of the general clause, of course, is that it is subject to interpretation in arbitration.

Even generalized management rights clauses may indirectly

enable employers to increase the scope of unilateral action, however. In the *Timken Roller Bearing* case there was a grievance procedure and a management clause which simply provided that there was vested exclusively in the company "management of the work and direction of the working forces, including the right . . . to relieve employees from duty because of . . . legitimate reasons . . . When the union demanded that it be consulted on the subject of subcontracting of work, and a strike during the course of the contract which contained the above clauses ensued, the court said:

The declination to confer with the union upon the subject of sub-contracting . . . involved the coverage of the management clause of the agreement. The company viewed the subject matter of the union's proposal as within its exclusive prerogative. It had always engaged in sub-contracting, it had been engaged in sub-contracting at the time the first collective bargaining contract with the union had been concluded, it was engaged in sub-contracting when the 1943 contract went into effect. No grievances had been filed with respect to it if we except the abortive grievance in July, which was never pressed. The practical construction put upon the management clause by both parties was, without controversy in the record, that sub-contracting was a function of management. Be that as it may—the dispute as it finally developed, was a dispute as to the interpretation of the management clause, and the contract specifically provided that such disputes were to be settled within the grievance procedure, and if they failed, by arbitration.

The court then went on to hold that since the duty to bargain may be channeled and directed by contractual agreement, this was not a case to be brought under Section 8 (a) (5), but, rather one for the grievance and arbitration process.

The role of the arbitrator may become more and more important because of what we have just said. But it should be borne in mind that management can, by further trading in the bargaining negotiations, limit by contract the authority of the arbitrator, too.

This makes advisable repetition here of the question: Should arbitration, if provided for, be required to determine whether there has in fact been a violation of the contract before the National Labor Relations Board may proceed with a charge that unilateral conduct constitutes a refusal to bargain? It would ap-

pear from the decisions above discussed that the grievance procedure must first be exhausted before resort can be had to the facilities of the NLRB. However, the General Counsel has proceeded initially to dispose of cases where the unilateral action appeared to him *not* to violate the bargaining agreement.¹²¹

There remains for discussion the principles laid down in *NLRB v. Jacobs Manufacturing Co.*¹²² and related cases which hold that the duty to bargain during the life of the contract does not include issues either (1) discussed before execution of or (2) contained in the contract. Section 8 (d) of the Act required interpretation therein, and the court said:

The purpose of this provision is, apparently, to give stability to agreements governing industrial relations. But, the exception thus created necessarily conflicts with the general purpose of the Act, which is to require employers to bargain as to employee demands whenever made to the end that industrial disputes may be resolved peacefully without resort to drastic measures likely to have an injurious effect upon commerce, and the general purpose should be given effect to the extent there is no contrary provision. Since the language chosen to describe this exception is precise and explicit, "terms and conditions contained in a contract for a fixed period," we do not think it relieves an employer of the duty to bargain as to subjects which were neither discussed nor embodied in any of the terms and conditions of the contract.

But if reliance is had on waiver by contract, there must be clear and unmistakable showing of such. In *E. W. Scripps Company*,¹²³ the Board said that although it has held that "a union may waive certain statutory rights by genuine collective bargaining," it has also asserted that such a waiver will not be readily inferred, for: "We are reluctant to deprive employees of any of the rights guaranteed them by the Act in the absence of a clear and unmistakable showing of a waiver of such rights."¹²⁴

CONCLUDING OBSERVATIONS

It is not necessarily true that unless management obtains written agreement, at least in general terms, permitting it to engage

¹²¹ NLRB GENERAL COUNSEL ADMINISTRATIVE RULINGS Nos. 793 and 843 (1953).

¹²² 196 F. 2d 680 (2d Cir. 1951).

¹²³ 94 N.L.R.B. 227 (1951).

¹²⁴ Tide Water Associated Oil Co., 85 N.L.R.B. 1096 (1949).

in certain unilateral action, it may have to consult the union on very nearly every phase of its business operation. While there is little in the National Labor Relations Act which saves employer rights to unilateral action besides Section 8 (b) (1) (B), forbidding interference with management's right to select its own officials to represent it in bargaining negotiations, there is much in the general body of jurisprudence over the years to guide possible future thinking of where the line may be drawn even without management clauses. An example of this general jurisprudence is *Opera on Tour, Inc., v. Weber*,¹²⁵ wherein it was held that an endeavor to prevent the use of a mechanical device "bears no reasonable relation to wages, hours of employment . . . or any other condition of employment," although, of course, the National Labor Relations Act was not construed there. In some cases the attempt of an employer to substitute a mechanical device for hand labor may very well be a legitimate subject of collective bargaining. But the point made here is simply that there are perhaps many things, as the Supreme Court pointed out in *American National Insurance Company, supra*, and the Board inferred in *Dixie Corp., supra*, which employers may do unilaterally despite union objections thereto, simply because they are not traditionally found in bargaining in the industry or common to "all collective bargaining principles, or, to put it another way, because these things have by tradition been regarded as "management prerogatives". The position taken by the NLRB General Counsel that promotion of employees to supervisory positions is an exclusive function of management foreshadows further development along this line.¹²⁶

¹²⁵ 285 N. Y. 348, 34 N.E. 2d 349 (1941).

¹²⁶ NLRB GENERAL COUNSEL ADMINISTRATIVE RULING, Case No. 825 (1953).